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265 NLRB No. 56

D--9485
New York, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WE-CARE TRADING CO., LTD.

and

Case 2--CA--18656

LEATHER GOODS, PLASTICS,
HANDBAGS & NOVELTY WORKERS'
UNION, LOCAL 1

DECISION AND ORDER

Upon a charge filed on March 10, 1982, by Leather Goods, Plastics, Handbags & Novelty Workers' Union, Local 1, herein called the Union, and duly served on We-Care Trading Co., Ltd., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint on April 30, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

Respondent failed to file an answer to the complaint by the time prescribed therein. Thereafter, according to the uncontroverted documents submitted with his instant Motion for Summary Judgment, counsel for the General Counsel wrote to

Respondent on June 2, 1982, stating that no answer to the complaint had yet been received and that a motion for summary judgment would be filed if an answer was not filed by June 17, 1982. On June 11, 1982, Respondent sent a letter to counsel for the General Counsel stating that the Union had agreed to withdraw the charge and that the complaint was untrue. However, counsel for the General Counsel determined that the letter did not conform with the Board's rules concerning the adequacy of an answer. Further, there was no indication that, in conformance with the Board's rules, the Charging Party had been served with a copy of the answer. Thereafter, on August 11, 1982, counsel for the General Counsel wrote to Respondent explaining the requirements of a legally sufficient answer, stating that the letter of June 11, 1982, did not meet these requirements, and again extending the time for filing an answer to August 20, 1982. No further communication was received from Respondent.

On September 2, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with exhibits attached. Subsequently, on September 8, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent did not file a response to the Notice To Show Cause, so the allegations of the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board' Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing was issued on April 30, 1982, and was duly served on Respondent. The complaint and notice of hearing specifically stated that, unless an answer to the complaint was filed within 10 days from the service thereof, ''all of the allegations in the Complaint shall be deemed to be admitted to be true and shall be so found by the Board.'' As noted above, on June 2, 1982, counsel for the General Counsel advised Respondent that an answer had not been received but extended the time for filing an answer. When Respondent filed its letter dated June 11, 1982, as its purported answer, counsel for the General Counsel thereafter wrote to Respondent, explaining that the letter was not a legally sufficient answer but again extending the time for filing a legally adequate answer. Counsel

for the General Counsel appended to the letter a copy of the Board's rules regarding the filing of an answer. Respondent has not filed an answer to the complaint, nor has it given any reason for its failure to do so.

It is clear that when an answer to an unfair labor practice complaint is not filed in compliance with the Board's rules judgment may be rendered on the basis of the complaint alone.[1] Therefore, no good cause to the contrary having been shown, and in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted and are found to be true. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

1. The Business of Respondent

Respondent, a New York corporation, at all times material herein has maintained its principal office and place of business in New York, New York, where it has engaged in the manufacture and nonretail sale and distribution of ladies handbags and related products. Annually, Respondent, in the course and conduct of its operations, purchases and receives at its New York, New York, facility products, goods, and services valued in excess of $50,000 directly from firms located outside the State of New York.

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[1] E.g., Jae K. Lee and Dang H. Song, a Partnership d/b/a Travelodge San Francisco Civic Center, 242 NLRB 287, 288 (1979); Neal B. Scott Commodities, Inc., 238 NLRB 32, 34 (1978).

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Leather Goods, Plastics, Handbags & Novelty Workers' Union, Local 1, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Unit and Recognition

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees of Respondent employed at its New York, New York, facility, including cutters, sewers, layout men, mechanics, machine operators, packers and shippers, but excluding office clericals, receptionists, guards, and supervisors as defined in Section 2(11) of the Act.

At all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and has been recognized as such by Respondent. Such recognition is embodied in a collective-bargaining agreement effective by its terms for the period of April 1, 1980, to March 31, 1983 (hereinafter the collective-bargaining agreement).

B. Violations

The collective-bargaining agreement contains a number of provisions with which Respondent has failed and refused to comply. Thus, it provides that:

(a) Respondent shall make contributions on behalf of the unit employees to an insurance trust fund and a medical plan.

(b) Upon receiving proper authorization, Respondent shall check off dues from the wages of unit employees and remit said moneys to the Union.

(c) The unit employees are entitled to certain days as paid holidays. Since on or about October 12, 1981, Respondent, unilaterally and without the Union's consent, has failed and refused to comply with these provisions of the collective-bargaining agreement.

The collective-bargaining agreement further provides that the layoff of the unit employees is to be effectuated in inverse order of seniority. Since on or about February 12, 1982, Respondent, unilaterally and without the Union's consent, has laid off approximately 18 of its employees in contravention of this provision of the collective-bargaining agreement.

The collective-bargaining agreement also provides that the recall of employees from layoff status is to occur in the order of seniority. In or about March 1982, Respondent, unilaterally and without the Union's consent, hired a new employee in the above-described unit, and failed and refused to comply with this provision of the collective-bargaining agreement.

In addition, the collective-bargaining agreement provides that the shop chairperson shall at all times have the greatest seniority for purposes of layoff and recall. On or about February 12, 1982, Respondent, unilaterally and without the Union's consent, laid off the shop chairperson in contravention of the collective-bargaining agreement.

Further, the collective-bargaining agreement provides for a procedure to resolve the grievances of the unit employees. On or about February 17 and 22, 1982, Respondent failed and refused to meet and confer with the Union concerning the layoff of the employees in contravention of this provision.

Finally, the collective-bargaining agreement provides that the Union shall have access to Respondent's premises, upon notice to Respondent, for the purpose of administering said agreement. On or about February 17 and 22, 1982, Respondent, unilaterally and without the Union's consent, failed and refused to provide the Union with access to its premises in order for the Union to administer the collective-bargaining agreement.

It is axiomatic that an employer may not refuse to comply with a term or condition of a collective-bargaining agreement without not only giving the employees' collective-bargaining representative prior notice and adequate opportunity to negotiate but also obtaining that representative's consent.[2] If these

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[2] Oak Cliff-Golman Baking Company, 202 NLRB 614, 616 (1973), affd. in relevant part 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974); C & S Industries, Inc., 158 NLRB 454, 456--459 (1966). See also N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421 (1967); Osage Manufacturing Company, 173 NLRB 458, 461--462 (1968).

conditions are not met, the employer will be found to have violated Section 8(a)(5) and (1) of the Act. There is no evidence here that Respondent has met these requirements. We therefore find that, by the acts and conduct described above, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and that Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act. Further, we find that, by the aforesaid acts and conduct, Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, and that Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, Respondent will be directed to cease and desist from engaging in the conduct found unlawful herein or like or related conduct and to take the following affirmative action necessary to effectuate the purposes and policies of the Act: (1)

upon request, bargain in good faith with the Union as the exclusive bargaining representative of the employees in the appropriate unit by restoring, placing in effect, and complying with all terms and conditions of employment as provided in the collective-bargaining agreement with which it has been found to have refused and failed to comply; (2) make whole the employees in the unit covered by the collective-bargaining agreement for any loss of wages or other benefits (including holiday pay) which they may have sustained as a result of Respondent's unlawful conduct;[3] (3) make whole the employees in the unit covered by the collective-bargaining agreement by paying all insurance trust fund and medical plan benefits as provided in the collective-bargaining agreement which have not been paid and would have been paid absent Respondent's unlawful discontinuance of such payments,[4] by reimbursing those employees for any medical bills

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[3] Such backpay shall be computed, with interest thereon, in the manner set forth in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

We leave for the compliance stage the determination of which employees covered by the collective-bargaining agreement were laid off earlier, and for how long, than they would have been had Respondent not contravened the layoff provision of the collective-bargaining agreement and which employees have not been recalled or were recalled later, and for how long, because Respondent contravened the recall provision of the collective-bargaining agreement. Cf. Calcite Corporation, 228 NLRB 1048, 1049--50 (1977).

[4] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to (continued)

they have paid directly to health care providers that the health plan would have covered, as well as any premiums they have paid to third-party insurance companies to continue medical coverage in the absence of Respondent's required contributions to the appropriate plan, and by reimbursing any employees for contributions they themselves may have made for the maintenance of the health plan because of Respondent's unlawful failure to contribute to this plan;[5] (4) pay over to the Union a sum of money, plus interest thereon,[6] equal to the sum of all dues which the collective-bargaining agreement required it check off and which were not received by the Union because of Respondent's failure to comply with the checkoff provision of the collective-bargaining agreement;[7] and (5) establish a preferential recall

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[4] provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. Ferro Mechanical Corp., 249 NLRB 669, 671, fn. 3 (1980).

[5] Interest on the reimbursements to the employees shall be paid in the manner prescribed in Florida Steel Corporation, supra. Angelus Block Co., Inc., Amari, Inc., 250 NLRB 868 (1980).

[6] Interest upon the sum due shall also be computed in the manner prescribed in Florida Steel Corporation, supra. See, generally, Isis Plumbing & Heating Co., supra. See, e.g., Stackpole Components Company, 232 NLRB 723 (1977).

[7] We also leave for the compliance stage the determination of whether Respondent unlawfully failed to check off and remit dues or whether it merely failed to remit these dues it had checked off. In the event it failed to check off the dues, Respondent shall be directed to do so and shall be permitted to offset this amount against the sums due each employee for lost wages and benefits. Further, to insure against a windfall to the Union, we shall specify that Respondent's dues reimbursement obligation, with accompanying right to offset, is not applicable to those employees, if any, who voluntarily paid dues to the Union during any or all of the pertinent period. Ogle Protection Service, Inc., and (continued)

list, following the system of seniority provided by the collective-bargaining agreement, including the provision of greatest seniority to the shop chairperson, of all the employees covered by that agreement who were laid off on or about February 12, 1982, in contravention of the layoff provision of the agreement, and offer reinstatement to their former or substantially equivalent positions to these employees as resumed operations create these positions, dismissing if necessary any employee hired to a position he would not have held but for Respondent's contravention of the layoff and recall provisions of the collective-bargaining agreement. Further, because Respondent has been found to have unlawfully laid off approximately 18 of its employees, it shall be ordered not only to post the attached notice at its principal office and place of business, but to mail a copy of the notice to each of the employees who were laid off and are no longer employed by Respondent.[8]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. We-Care Trading Co., Ltd., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[7] James L. Ogle, an Individual, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971); Creutz Plating Corporation, 172 NLRB 1 (1968).

[8] SFS Painting and Drywall, Inc.; James Seech d/b/a J. Seech Painting and Drywall, 249 NLRB 111 (1980); Creative Engineering, Inc., 228 NLRB 582, 582--583 (1977).

2. Leather Goods, Plastics, Handbags & Novelty Workers' Union, Local 1, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the acts described in section III, above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, We-Care Trading Co., Ltd., New York, New York, its officers, agents, sucessors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Leather Goods, Plastics, Handbags & Novelty Workers' Union, Local 1, as the exclusive bargaining representative of the employees in the following appropriate unit covered by Respondent's current collective-bargaining agreement with that Union:

> All full-time and regular part-time production and maintenance employees of Respondent employed at its New York, New York, facility, including cutters, sewers, layout men, mechanics, machine operators, packers and shippers, but excluding office clericals, receptionists, guards, and supervisors as defined in Section 2(11) of the Act.

(b) Refusing to bargain in good faith with the Union by failing and refusing to comply with the following provisions of

its current collective-bargaining agreement with the Union: (1) insurance trust fund and medical plan, (2) dues checkoff, (3) paid holidays, (4) layoff order, (5) recall order, (6) shop chairperson seniority, (7) grievance procedure, and (8) union access to Respondent's premises to administer the collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit.

(b) Bargain in good faith by restoring, placing in effect, and complying with all terms and conditions of employment as provided in the collective-bargaining agreement with which it has been found to have failed and refused to comply.

(c) Make whole the employees in the unit covered by the collective-bargaining agreement, in the manner set forth in the Remedy section of this Decision, for any loss of wages or other benefits (including holiday pay) which the employees may have sustained as a result of Respondent's unlawful conduct.

(d) Make whole the employees in the unit covered by the collective-bargaining agreement, in the manner set forth in the Remedy section of this Decision, by transmitting the contributions owed to the insurance trust fund and medical plan,

and by reimbursing those employees for any medical expenses ensuing from Respondent's unlawful failure to make such required contributions. This shall include reimbursing those employees for contributions they themselves may have made for the maintenance of the insurance trust fund and/or medical plan after Respondent ceased contributing, for any premiums they may have paid to third-party insurance companies for medical coverage, and for any medical bills they paid directly to health care providers that the medical plan would have covered.

(e) Pay over to the Union a sum of money, in the manner set forth in the Remedy section of this Decision, Respondent has checked off or will check off as dues from unit employees, equal to the sum of all dues which the collective-bargaining agreement required it check off and which were not remitted to the Union because of Respondent's failure to comply with the checkoff provision of the collective-bargaining agreement.

(f) Establish a preferential recall list, following the system of seniority provided by the collective-bargaining agreement, including the provision of greatest seniority to the shop chairperson, of all the employees covered by that agreement who were laid off on or about February 12, 1982, in contravention of the layoff provision of the agreement, and offer reinstatement to their former or substantially equivalent positions to these employees as resumed operations create these positions, dismissing if necessary any employee hired to a position he would not have held but for Respondent's contravention of the layoff and recall provisions of the collective-bargaining agreement.

(g) Upon request by the Union, submit to the procedures of the collective-bargaining agreement any grievance referrable thereunder.

(h) Provide access to its premises to the Union for purposes of administering the collective-bargaining agreement.

(i) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and any other moneys due under the terms of this Order.

(j) Post at Respondent's principal office and place of business in New York, New York, copies of the attached notice marked ''Appendix.''[9] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. In addition, copies of the notice, duly signed by Respondent's representative, shall be mailed to all employees who were laid off on or about February 12, 1982, who were members of the unit

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

covered by the collective-bargaining agreement. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. November 22, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Leather Goods, Plastics, Handbags & Novelty Workers' Union, Local 1, as the exclusive bargaining representative of the employees in the following appropriate unit covered by our current collective-bargaining agreement with that Union:

> All full-time and regular part-time production and maintenance employees employed at our New York, New York, facility, including cutters, sewers, layout men, mechanics, machine operators, packers and shippers, but excluding office clericals, receptionists, guards, and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT refuse to bargain in good faith with the above-named Union by failing and refusing to comply with the following provisions of our current collective-bargaining agreement with that Union: (a) insurance trust fund and medical plan, (b) dues checkoff, (c) paid holidays, (d) layoff order, (e) recall order, (f) shop chairperson seniority, (g) grievance procedure, and (h) union acccess to our premises to administer the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive bargaining representative of our employees in the appropriate unit.

WE WILL bargain in good faith by restoring, placing in effect, and complying with all terms and conditions of employment as provided in the collective-bargaining agreement with which we have been found to have failed and refused to comply.

WE WILL make whole the employees in the unit covered by the collective-bargaining agreement for any loss of wages or other benefits (including holiday pay) which the employees may have sustained as a result of our unlawful conduct, plus interest.

WE WILL make whole the employees in the unit covered by the collective-bargaining agreement by transmitting the contributions owed to this insurance trust fund and medical plan, and by reimbursing those employees, plus interest, for any medical expenses ensuing from our unlawful failure to make such required contributions. This shall include reimbursing those employees, plus interest, for contributions they themselves may have made for the maintenance of the insurance trust fund and/or medical plan after we ceased contributing, for any premiums they may have paid to third-party insurance companies for medical coverage, and for any medical bills they paid directly to health care providers that the medical plan would have covered.

WE WILL pay over to the Union a sum of money, plus interest, we have checked off or will check off as dues from unit employees, equal to the sum of all dues which the collective-bargaining agreement required we check off and which were not remitted to the Union because of our failure to comply with the checkoff provision of the collective-bargaining agreement.

WE WILL establish a preferential recall list, following the system of seniority provided by the collective-bargaining agreement, including the provision of greatest seniority to the shop chairperson, of all the employees covered by that agreement who were laid off on or about February 12, 1982, in contravention of the layoff provisions of the agreement, and offer reinstatement to their former or substantially equivalent positions to these employees as resumed operations create these positions, dismissing if necessary any employee hired to a position he would not have held but for our contravention of the layoff and recall provisions of the collective-bargaining agreement.

WE WILL, upon request by the Union, submit to the procedures of the collective-bargaining agreement any grievance referrable thereunder.

WE WILL provide access to our premises to the Union for purposes of administering the collective-bargaining agreement.

WE-CARE TRADING CO., LTD.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10278, Telephone 212--264--0360.